No. 89-860

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

EARL R. BREES,

Petitioner,

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Respondents.

APPENDIX - VOLUME 1 of 3
TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5273 September Term, 1988
C.A. 74-00972

Earl R. Brees,
Appellant

v.

Robert E. Hampton, individually and as Chairman of the U.S. Civil Service Commission et al.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

[Filed August 29, 1989.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5273 September Term, 1988
C.A. 74-00972

Earl R. Brees,
Appellant
v.

Robert E. Hampton, individually and as Chairman of the U.S. Civil Service Commission et al.

BEFORE: Mikva, Buckley and Williams, Circuit Judges

ORDER

Upon consideration of Appellant's petition for rehearing, filed July 28, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

[Filed August 29, 1989.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued: March 13, 1989
Decided: June 13, 1989

No. 88-5273

EARL R. BREES, APPELLANT

v.

ROBERT E. HAMPTON, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.

On Appeal from the United States District Court for the District of Columbia

(Civil Action Nos. 74-0972, 75-0178)

Tracy E. Mulligan, with whom Glenn H. Carlson was on the brief, for appellant.

Molly D. Current, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, and John D. Bates, and R. Craig Lawrence, Assistant United States Attorneys, were on the brief, for appellees. Daniel Bensing, Assistant United States Attorney, also entered an appearance fo appellees.

Before: MIKVA, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge: This is the appeal of a Title VII action, 42 U.S.C. §2000e-16, brought by the administrator of the estate of the late Earl R. Brees. The defendant-appellees ("defendants") are three U.S. government agencies: the Office of Economic Opportunity ("OEO") (now the Community Services Administration), the Civil Service Commission ("Commission"), and the Department of Commerce ("Department"). The initial complaint also named as defendants the heads of the agencies in their individual capacities, but the district court dismissed these counts, and that portion of the ruling has not been appealed.

Appellant argues that beginning in 1968, Mr. Brees, a white male, was unlawfully discriminated against on the basis of his race and was subjected to reprisals for complaining about that discrimination.

Appellant maintains that defendants unlawfully denied Mr. Brees employment and promotions within the federal civil service, and, as evidence of reprisals, points to alleged violations of federal personnel regulations and to various administrative proceedings that were assertedly conducted in an unfair fashion. The district court, however, granted summary judgment for the defendants because it found that the principal charges in appellant's complaint were precluded by a 1971 settlement agreement voluntarily entered into by Mr. Brees, and that the remainder of appellant's claims had little merit. See Brees v. Hampton, Nos. 74-0972, 75-0178, Memorandum opinion (D.D.C. July 20, 1988) ("Mem. op."). We agree with the district court.

It is discomfiting that this lawsuit, which began in 1974, is only now con-

cluding. While in some cases such a long delay might be justified, in this instance the judicial system suffers the blame. The summary judgment motions should have been decided within a reasonable time frame or the case should have been ordered to trial.

I.

Earl Brees was a disabled veteran honorably discharged from military service in 1960. During the next six years, he obtained a college degree and worked from time to time in both federal civil service jobs and in the private sector. In 1967, Mr. Brees worked for a private travel company, Travel Consultants, Inc., as controller. In early May 1967, he signed five checks drawn on his company's account, totalling over $80,000, all payable to "J.R. Bishop," his wife's maiden name. His company became aware of his action,

and on May 27, 1967, he was arrested for embezzlement. The charge was changed first to forgery, and then later to false pretenses. On September 15, 1967, Mr. Brees pled guilty to the misdemeanor charge of "attempted false pretenses," received a one-year sentence (which was suspended), and was placed on probation for a year.

On June 8, 1967, Mr. Brees was hired by the Interior Department's Bureau of Land Management as an operating accountant, GS-9. He sought transfer to the Accounting Systems Branch, Finance Division, of the OEO. On May 25, 1967 (two days prior to his arrest) he had submitted an employment application to the OEO, question 37 of which asked: "Have you ever been convicted of an offense against the law or forfeited collateral or are you now under charges for any offense against the law?"

Mr. Brees answered "No".

On August 27, 1967, Mr. Brees was transferred from the Interior Department to OEO, where he was employed as a GS-11 accountant. On August 28, he signed an appointment affidavit ("Standard Form 61"), which contained the following question: "Since you filed [an] application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Mr. Brees responded "No". On the same day his fingerprints were taken and a routine National Agency Check and Inquiry was begun.

By all accounts, Mr. Brees performed his job satisfactorily, and on October 22, 1967, he was promoted to a GS-12 position. On March 1, 1968, the Civil Service Commis-

sion notified the OEO Personnel Security Officer that the National Agency Check and Inquiry had revealed Mr. Brees' prior arrest. On March 6, OEO requested that the Commission conduct a full field investigation of Mr. Brees.

By letter of June 27, 1968, OEO notified Mr. Brees that it proposed to remove him from his position because he had falsified his Standard Form 61. On July 19, after receiving his reply, OEO dismissed him, effective August 3. On August 2, 1968, Mr. Brees sent separate letters to President Lyndon B. Johnson and to the complaints officer at the Commission, in which he alleged that he was the victim of racial discrimination, and on the same day he appealed to the Appeals Examining Office of the Civil Service Commission. Mr. Brees contended that had he been black, he would have been granted rehabil-

itated offender status and would not have been terminated.

On January 21, 1969, the Appeals Examining Office set aside Mr. Brees' removal, on the ground that the Standard Form 61 he had signed in August required him to disclose only events that occurred after the date that OEO had received his initial application (which, although dated May 25, was not in fact received by OEO until August). On February 4, Mr. Brees was reinstated to his position at OEO but at the same time received a letter dated January 31 proposing his removal on different grounds (fraud and deception in obtaining federal employment, and criminal conduct). He was dismissed on March 5, effective March 7. Mr. Brees appealed within OEO and was given a hearing before a Hearing Committee in November and December 1969. The Committee unanimously

recommended his reinstatement to a less sensitive position, concluding in its report of March 6, 1970 that OEO's action in discharging him a second time was "not taken in good faith." The Committee found that "[r]ather than reinstat[ing Mr. Brees] and try[ing] to live with the situation, OEO made the decision to terminate him again, come what may," even though Brees was a "superior worker." The Committee concluded:

> We find that the underlying cause for the second discharge was the agency's hostility to Mr. Brees which had built up since the first discharge and which he had exacerbated by his victory at the Civil Service Commission. We find that the agency rationalized its predetermined decision not to reinstate [Mr. Brees] * * *.

On March 31, 1970, however, OEO issued a

final agency decision sustaining the discharge on the ground of criminal conduct.

Mr. Brees again appealed to the Appeals Examining Office, which rescinded OEO's decision and remanded the discharge case to the agency with instructions to process several discrimination complaints that Mr. Brees had filed but that OEO had not yet acted upon. This delay violated regulations requiring that discrimination complaints be processed within 60 days in cases where hearings were not held, and within 90 days where hearings were held, see 5 C.F.R. § 713.218(a) (1969); 5 C.F.R. § 713.220(a) (1970). On January 21, 1971, the Commission's Board of Appeals and Review rejected OEO's appeal from the Appeals Examining Office decision, and on February 11, 1971, OEO began processing Mr. Brees' discrimination complaints. An

equal employment opportunity ("EEO") counselor was appointed in April 1971, and a report completed in June. The EEO counselor stated that he could not determine whether OEO had discriminated against Mr. Brees on the basis of race, because the agency refused to make available the criminal records of black felons so that the treatment they received could be compared with that of Mr. Brees. Nevertheless, the counselor found that "the squence of events point[s] quite strongly to the possibility of discrimination in the form of reprisals against Mr. Brees because he filed a complaint of discrimination." As support for his conclusion, the counselor noted that "[i]t is difficult to understand whe OEO would be unwilling to simply transfer Mr. Brees to a position unrelated to finance." On June 30, 1971, OEO requested the Commission to

furnish an investigator for Mr. Brees' EEO claim against the agency, and on July 21, OEO was notified that an EEO investigator had been obtained from the U.S. Information Agency.

Meanwhile, between May 1968 and February 1969, the Washington Area Examining Office of the Civil Service Commission received several applications for employment from Mr. Brees. As was customary in such cases, the applications were referred to the Commission's Bureau of Personnel Investigation ("BPI") for a determination of the applicant's "suitabililty" for federal employment. On March 5, 1969, BPI issued a show-cause letter to Mr. Brees informing him that he had 15 days to reply to certain information which had surfaced during the investigation of his suitability. BPI listed Mr. Brees' involvement in criminal proceedings; his

departure from Travel Consultants at the time the attempted embezzlement was discovered; and the fact that he had listed on all but one of his applications that the reason he left Travel Consultants was "excessive hours of work." BPI received and considered Mr. Brees' reply. By letter dated March 28, 1969, Stanley N. Taylor, Chief of the Division of Adjudication and Appraisal at BPI, notified Mr. Brees that on the basis of his "dishonest conduct," his applications for federal employment had been rated ineligible.

On April 16, 1969, Mr. Brees appealed the rating to Kimbell Johnson, Director of BPI, who affirmed the decision, stating that "[b]ecause of the evidence and recency of your violation of the trust and confidence in employment, the Commission cannot at this time accept your applications for certification to governmeng

agencies for employment." Mr. Brees further appealed his rating to the Commission's Board of Appeals and Review, again raising the issue of racial discrimination. On June 3, 1969, the Board sustained the finding of the Director.

In July 1971, Mr. Brees and OEO officials began discussing the settlement of his claims against the agency. These negotiations culminated in an agreement dated August 6, in which OEO promised to cancel Mr. Brees' second removal (dated March 7, 1969), and to reinstate him with back pay (some $19,000). Mr. Brees pledged to take annual leave from August 9, 1971, until October 19, 1971, and to take unpaid leave thereafter until September 6, 1972, at which time he would resign (unless he chose to do so earlier). Mr. Brees agreed that this was in settlement of his claims arising out of the

personnel actions taken against him by OEO.

In the summer of 1971, Mr. Brees also became aware of a memorandum drafted by Stanley N. Taylor, Chief of BPI's Division of Adjudication and Appraisal, dated July 7, 1971, and addressed to his supervisor, Kimbell Johnson, Director of BPI. The Taylor memorandum contained allegedly defamatory information that would have damaged Mr. Brees' employment prospects. For example, it said that he had been convicted in United States district court on the charge of false pretenses, while in fact he had pled guilty to attempted false pretenses in D.C. Superior Court. The memorandum went on to characterize Brees' appeals as "perver[sion]" of the civil service appeals process, and commented that "it is absolutely asinine to state that Brees ahd been 'cleared' by anyone."

On October 28, 1971, Mr. Brees attempted to return to work at OEO and was refused. The next day, he attempted to withdraw his resignation, and this request was also denied by the agency. Mr. Brees then appealed to the Commission, alleging that his resignation was involuntary and that he should be allowed to withdraw it. The Commission determined on May 4, 1973 that the resignation was voluntary and that the agency had valid reasons for not granting the withdrawal request. The district court later remanded the case to the Commission for a full hearing on the issue of voluntariness; the Commission affirmed its earlier decision that the resignation was voluntary.

In 1973, Mr. Brees applied for a temporary position as a computer specialist in the Office of Telecommunications at the Department of Commerce. While his

application was being subjected to a pre-appointment check, the Department decided to abolish the position. Appellant charges that the Department acted after receiving false and unfavorable information about Mr. Brees from BPI through improper channels. The Department's Investigations and Inspections Staff conducted an investigation, and a hearing was held on September 18, 19, and 24, 1975. After evaluating all the evidence, the complaints examiner concluded on January 13, 1976 that "the agency's inaction with respect to complainant's applications for various positions was unrelated to complainant's discrimination complaint," and recommended that Mr. Brees' complaint be dismissed. On appeal, the Department's Acting Assistant Secretary for Administration agreed. Later, a different complaints examiner appointed by

the Civil Service Commission found that there was no evidence that any improper release of information by BPI was approved by BPI officials or even known to them.

In late 1973, Mr. Brees submitted additional applications for employment with Commission examining offices in Washington, Oklahoma City, Atlanta, Pittsburgh and St. Louis. The Washington, Atlanta, and Pittsburgh offices submitted requests to BPI for determinations of suitability, triggered by Mr. Brees' previous rating of unsuitability and his 1969 arrest. Between December 6, 1973, and January 4, 1974, and again between February 6 and 7, BPI conducted investigations of Mr. Brees' suitability. As a result thereof, Mr. Brees was invited to attend a meeting in April to offer any comments, explanations, or information he wished BPI to consider. Mr. Brees replied

that on advice of counsel, he preferred to respond via interrogatories rather than in person. By letter dated June 20, 1974, the Commission sent Mr. Brees a statement of information that required his comment, to which he replied on July 1. On June 27, 1974, Mr. Brees filed suit in U.S. district court, and action on the suitability determinations was suspended until the U.S. Attorney later requested that they be completed. In 1975, Mr. Brees received a positive suitability rating.

In December 1973 and January 1974, Mr. Brees filed a series of EEO complaints against BPI and the Commission, alleging racial discrimination and reprisals against him for filing earlier complaints. The Commission initially took the position that 5 C.F.R §713.212(a) (1974) permitted complaints of discrimination to be filed against an agency only by its employees or

applicants for positions within that agency, and did not authorize complaints such as the one Mr. Brees attempted to file directly against BPI. On November 19, 1975, however, the district court remanded the complaints to the Commission and ordered that they be processed. An investigation was conducted from January 5 through January 28, 1976. Efforts at informal resolutions were unsuccessful, and by letter of June 24, 1976, Mr. Brees requested a hearing on his allegations. A prehearing conference was held on January 11, 1977, and the hearing was conducted on April 12, 21, 25-28, June 22, 27-29, and July 6-8, 1977. Mr. Brees was represented by counsel. The complaints examiner concluded that "[t]he evidence presented fails in each instance to show that the actions charged stem from discrimination and/or retaliation for earlier complaints,"

and recommended that a decision issue "that there was no discrimination and/or reprisal against Mr. Brees," On September 8, 1977, the Civil Service Commission announced its final decision in which it adopted the findings and recommendation of the complaints examiner.

The district court proceeding then resumed. After the Commission's decision on remand, Mr. Brees deposed a number of witnesses, and the government successfully moved for a protective order. On January 18, 1978, the district court granted Mr. Brees' oral motion for leave to file a motion for summary judgment by February 20, 1978; Mr. Brees later sought and was granted extensions. During March 1978, Mr. Brees filed twelve motions for summary judgment, see Mem. op. at 2 n.2, and on April 19, defendants submitted their response to Mr. Brees' motions and moved

for summary judgment as well. Over the next several months, the parties sparred over appropriate statements of stipulated material facts. On June 5, 1979, Mr. Brees moved to compel the Commission and OEO to file the complete administrative record; the defendants filed their response on July 11.

The docket sheets list no substantive development in the case until October 5, 1984, when Mr. Brees requested a settlement conference and submitted a supplemental memorandum of points and authorities in support of his pending motions for summary judgment. The court on February 21, 1985, denied Mr. Brees' request to refer the case to a magistrate for settlement proceedings, and directed the parties to produce a complete administrative record. Thereafter, on October 2, 1985, the court issued a memorandum and order

directing Mr. Brees to show cause within 30 days why his complaint should not be dismissed with prejudice. Mr. Brees responded to this order on October 28, and two days later submitted an outline of the administrative record.

In 1987, Mr. Brees applied to this court for a writ of mandamus to order the district court to issue its decision, and on May 1 of that year, this court denied the petition, commenting that "[w]e are confident that the district court will act with all due haste." In re Earl Roland Brees, No. 87-5086 (D.C. Cir. May 1, 1987). On July 2, 1987, counsel notified the district court that Mr. Brees had died. The following year, his estate sought another writ of mandamus, which was rendered moot when, on July 20, 1988, the district court granted summary judgment in favor of the defendants.

The estate of Earl R. Brees appeals.

II.

A.

The issue in this case is whether the district court erred in granting summary judgment to the defendants. The Federal Rules of Civil Procedure preclude summary judgment if "there is [a] genuine issue as to any material fact"; otherwise, "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the defendants have carried their burden of demonstrating the absence of any genuine issues of material fact, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), appellant must come forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). The defendants need not provide evidence specifically negating appellant's claims, see Celotex Corp. v. Catrett, 477 U.S.

317, 323-26 (1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The issue is whether a "fair-minded jury could return a verdict for the [appellant] on the evidence presented." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

Notwithstanding the barrage of charges, investigations, proceedings, reports and reviews, the district court was correct in finally concluding that no genuine issue of material fact existed in this case. As an initial matter, the settlement agreement itself precludes many of Mr. Brees' claims. The agreement provides that it was entered into

> in resolution of the adverse action taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual Chapter 752 and shall in no way be construed to mean that OEO or any other agency has found or may find in favor of Mr. Brees' complaint of discrimination.

Mr. Brees further promised to "irrevocably withdraw[] his complaint of discrimination against the OEO" and "not to file subsequent complaints and appeals resulting from or arising out of the same subject matter as contained in his complaint and appeal or from any decisions heretofore made by the Office of Economic Opportunity concerning Mr. Brees." That agreement bars as a matter of law any action arising out of Mr. Brees' termination from OEO, as well as any subsequent claims resulting from that termination, against OEO or any other agency.

Appellant argues that the settlement agreement is invalid because Mr. Brees was coerced into signing it, and his consent was therefore not "voluntary and knowing," Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). Appellant also contends that the settlement was not "voluntary" within the meaning of applicable regulations because the government set the effective date of Mr. Brees' resignation, and that the settlement was void both for lack of consideration and because the provision in the agreement making his resignation "irrevocable" was illegal. We address these objections in turn.

First, we find that appellant has not established the existence of a genuine issue of material fact with respect to duress or coercion. While Mr. Brees undoubtedly faced financial and other

pressures to enter into the settlement agreement, the circumstances surrounding the settlement suggest that it was voluntary. Mr. Brees himself requested the meeting which led to the commencement of the settlement negotiations, and, according to an affidavit submitted by the defendants, Mr. Brees originated the idea that "if he could be reinstated with back pay he would be willing to resign." The Associate Director of the OEO's Office of Administration swore in an affidavit that "[u]ntil Brees had volunteered to resign in conjunction with his reinstatement, the idea of his resignation had never crossed my mind." The settlement agreement itself recites that "Mr. Brees further acknowledges that he made the initial offer to resign and that his offer and the provisions for resignation contained herein were not secured or obtained by duress or

coercion." Mr. Brees received a draft of the proposed settlement agreement on July 29, and did not sign it until August 6, indicating that he had more than a week to review it.

Nor did the agreement become involuntary within the meaning of 5 C.F.R. §715.202(a) (1971), which provided that an employee "is free to resign at any time [and] to set the effective date of his resignation," because OEO, rather than Mr. Brees, set the effective date of his resignation. Mr. Brees chose "the effective date of his resignation" by voluntarily entering into the settlement agreement, which provided that:

> Mr. Brees hereby resigns from his position in the Office of Economic Opportunity effective September 6, 1972, unless Mr. Brees decides on his own volition to resign on a date prior to September 6, 1972.

Mr. Brees was a knowing and willing participant in the negotiations that culminated in the settlement agreement, and by his assent to the settlement he fixed his own date of resignation within the meaning of the regulation.

Appellant also contends that OEO had legal authority to award Mr. Brees back pay only by virtue of the January 21, 1969, Appeals Examining Office decision ordering his reinstatement, and that his reinstatement with back pay signalled some sort of acceptance by OEO of that decision. The Standard Form 50, Notification of Personnel Action, which cancelled appellant's second removal and reinstated him, cited as authority for the provision of back pay "subchapter IX, 5 U.S. Code." By statute, back pay may be awarded only to an employee "who, on the basis of a timely

appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, [or] regulation * * * to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. §5596(b)(1). Regulations promulgated under this section authorized an agency to grant back pay if it determined that a personnel action was "unjustified" or "unwarranted," 5 C.F.R. §§550.801(b), 550.803(a) (1971). Appellant maintains that only by implicitly recognizing the illegal nature of Mr. Brees' second removal could OEO have derived legal authority to award him back pay. But if OEO had already determined that the second removal was illegal, then it was under a pre-existing legal duty to reinstate Mr. Brees, and there was no consideration for the settlement agreement. Appellant concludes that faced with

this dilemma, defendants must concede either that Mr. Brees' second removal was unlawful and that the settlement agreement was void for lack of consideration, or that OEO had no legal authority to award back pay and that the agreement was void ab initio for that reason. We think no such dilemma exists.

Mr. Brees received valuable consideration for the settlement agreement. When it was reached, no final decision had been made as to the legality of the second removal. The agreement itself expressly states that OEO did not admit that it or any other agency "has found or may find in favor of Mr. Brees' complaint of discrimination." OEO had rejected the Hearing Committee's recommendation that Mr. Brees be reinstated, and he had appealed to the Commission's Appeals Examining Office. The Commission then vacated OEO's decision

to remove him and remanded the case to OEO with instructions to process his discrimination complaints. Whatever the merits of Mr. Brees' claim that his second removal was illegal, he was by no means assured of prevailing; at the very least, his back pay and vacation credits would have been received only after substantial delay.

The second horn of OEO's alleged dilemma is equally frail. We see no basis for appellant's assumption that the civil service regulations required OEO to admit that Mr. Brees' discrimination complaint was valid as a prerequisite to awarding him back pay. Appellant, following the OEO Hearing Committee's report of March 6, 1970, maintains that OEO did not act in good faith in terminating Mr. Brees for a second time so soon after the Appeals Examining Office had ordered him rein-

stated. But this does not mean that Mr. Brees cuold not have been terminated later, on different grounds. By way of illustration, the Appeals Examining Office opinion of January 21, 1969, which had ordered Mr. Brees reinstated after his first removal, cautioned that:

> In issuing this opinion we do not mean to suggset that [Mr. Brees'] conduct in connection with his application for Federal employment is praiseworthy or that he acted with full candor. Nor are we saying that the agency is powerless to seek and effect the appellant's discharge [on] the facts exhibited in this record. All we hold is that the agency has not supported its charge that Mr. Brees falsified Standard Form 61.

Mem. op. at 7. OEO, for example, might have determined that Mr. Brees' second removal was "unwarranted" or "unjustified" because it was not undertaken in good

faith, and yet have retained the ability to discharge Mr. Brees again, on the same or other grounds, if it followed the correct procedures. OEO, in other words, could have conceded that the second removal was procedurally improper, and paid Mr. Brees back pay under the settlement agreement, without extinguishing its right to terminate him later.

Finally, appellant argues that the agreement was void because OEO refused to permit Mr. Brees to withdraw his resignation. The applicable regulation provided that:

> A resignation is binding on an employee once he has submitted it, except that the agency, in its discretion, may permit the employee to withdraw his resignation at any time before it has become effective.

5 C.F.R. §715.202(b) (1971). In 1973 the regulation was amended and another sen-

tence added: "An agency may decline a request to withdraw a resignation before its effective date only when the agency has a valid reason and explains that reason to the employee." The settlement agreement in this case provided that the appellant's resignation was "irrevocable" and "shall not be withdrawn by Mr. Brees," which appellant maintains violated even the 1971 version of the regulation.

Even assuming arguendo that Mr. Brees could not bargain away whatever entitlement he had to withdraw his resignation, the regulation by its terms vested discretion in the agency over the matter, and OEO did not abuse its discretion in this case by refusing Mr. Brees' request to withdraw his resignation. The Commission noted that by means of the settlement, OEO had reinstated Mr. Brees, paid him back salary, and provided him vacation time

credits, all on the assumption that Mr. Brees would resign. Permitting Mr. Brees to withdraw his resignation would have allowed him to renege on his part of the bargain. We defer to the Commission's view that the settlement did not contravene civil service regulations. "An agency's interpretation of its own regulations is entitled to great weight." Tallahasee Branch of the NAACP v. FCC, 870 F.2d 704, 710 (D.C. Cirt. 1989).

B

Appellant urged several additional claims before the district court, all of which were correctly rejected by the summary judgment. The administrative record raised no genuine issue of material fact for trial.

Appellant maintains that the background check of Mr. Brees conducted in 1968 and 1969 was discriminatory. The

record shows, however, that BPI routinely conducted suitability determinations on applicants referred to it by all federal agencies. An EEO complaints examiner who reviewed the case in 1977 concluded that "[t]he 1969 suitability rating was found, on appeal through appropriate Civil Service channels, to have been in full consonance with the regulations governing BPI at the time," and that "neither the initiation of nor the outcome of the 1969 suitabililty determination appeals to have been either discriminatory or regulatory [sic] The EEO complaints examiner also found that "[n]o conclusion of discrimination or disparate treatment can be drawn." All Washington area applications were at that time referred to BPI, and "there was no indication that Mr. Brees received any different treatment * * * from any other applicant."

Washington area applications were at that time referred to BPI, and "there was no indication that Mr. Brees received any different treatment * * * from any other applicant."

Second, appellant claims that BPI discriminated and retaliated against Mr. Brees by unreasonably delaying the completion of his 1973-74 suitability determination. We find, however, that although a delay may have occurred, there was no indication that it was due to discrimination against Mr. Brees. Contributing to the delay were factors for which Mr. Brees must share some responsibility: the congressional inquiries into BPI that he instigated, his decision to file suit in U.S. district court, and his desire to respond in writing to BPI's requests for information, rather than to appear in person as BPI had suggested. While BPI

evidently did not act with dispatch during this entire protracted epic, appellant has introduced no evidence that this delay was discriminatory in nature.

Third, appellant contends that the Commission discriminated against Mr. Brees by initially refusing to process his discrimination claim against BPI in December 1973. This refusal, however, cannot serve as a cause of action, because Mr. Brees has already received a remedy; the district court ordered the Commission and BPI to process his complaints. A hearing was held, and an examiner made extensive findings of fact accepted by both the Commission and district court, see Mem. op. at 15-16. The hearing examiner concluded that Mr. Brees' complaints before the Commission and BPI were meritless, and that he had not established that he had suffered either discrimination or reprisals.

Fourth, appellant maintains that the Commission discriminated against Mr. Brees by failing to provide a full and fair hearing and decision on his discrimination claims. Specifically, appellant alleges that numerous procedural defects occurred in the Commission's investigation and hearing on remand from the district court. The district court found that any such defects were "either nonexistent or inconsequential to the overall fairness of the various proceedings," Mem. op. at 18, and we agree. The procedural complaints were examined in detail by the Commission, and none has merit.

Fifth, appellant argues that BPI and the Commission discriminated against Mr. Brees by interfering with the preparation and prosecution of his discrimination claims. Appellant alleges that the Commission failed to provide Mr. Brees with

uncensored versions of documents during the hearings on remand ordered by the district court. Portions of documents were deleted, for example, on the ground that they were "embarassing to the government's case." An EEO complaints examiner, however, has already rejected appellant's argument, finding that the relevant passages "do not pertain to the issues at hand and there was therefore no impropriety in their deletion." Appellant provides no reason why this conclusion is in error.

In addition, appellant contends that BPI withheld necessary statistical information comparing the treatment of white and black ex-offenders under the Rehabilitated Offender Program. On remand from the district court, an EEO complaints examiner discussed this allegation at length and concluded that compilation of the statistics would be a monumental task that could

be accomplished only through a manual search of three to five million records. As a practical matter, then, the information was unavailable.

Finally, appellant contends that the Commission and BPI discriminated against Mr. Brees by illegally furnishing false derogatory information about him to the Department of Commerce. In 1973, when Mr. Brees applied to the Department, he was allegedly told by Commerce officials that he was qualified for a position there. The position for which he applied was later abolished. Appellant contends that this action was taken on the basis of defamatory information furnished by BPI.

An EEO complaints examiner, however, after an extensive investigation and hearing, found that the elimination of the position was not a product of discrimination against Mr. Brees. Instead, the

examiner found that the references provided by Mr. Brees did not supply evidence favorable to his employment application. As a result, the Commerce Department contacted BPI, and learned that an investigation regarding Mr. Brees' suitability was underway. Consequently, the Department held Mr. Brees' application in abeyance pending receipt of a report from BPI. This is the same 1973 suitabililty determination that we have already found was not delayed because of discrimination or reprisals. In the interim, the position was abolished. The examiner found no evidence of a reprisal; he noted instead that "[t]he alleged inabililty to obtain information concerning [Mr. Brees'] past employment arose prior to [his] filing the discrimination complaint." We find that even if an unauthorized release of information occurred, there is no evidence that

it damaged Mr. Brees in any way. We have no occasion to pass on the defendants' suggestion that they are not liable for the release of information in any event because BPI's policy forbade it and because no BPI official in any position of authority approved the release or was aware of it, see Meritor Savings Bank v. Vinson, 477 U.S. 57, 72-73 (1986).

In sum, appellant has failed to present an issue of material fact regarding Mr. Brees' Title VII claim.

C.

We regret the necessity for commenting on the long period of time during which the parties' respective motions for summary mudgment were pending before the district judge. Summary judgment is intended to shorten proceedings, not draw them out. See Celotex Corp. v Catrett, 477 U.S. 317, 327 (1986); 10 C. Wright and

A. Miller, Federal Practice and Procedure § 2712, at 563 (2d ed. 1983). It is no accident that the first Federal Rule of Civil Procedure proclaims that the purpose of the Rules is "to secure the just, speedy and inexpensive determination of every action."

As civil caseloads continue to increase, see Marvell, Caseload Growth -- Past and Future Trends, 71 Judicature 151, 153 (1987), the court system must be ever more sensitive to avoidable litigation delays. A strictly enforced litigation calendar is indispensable in controlling such delays, see Mahoney & Sipes, Zeroing In On Court Delay: The Powerful Tools of Time Standards and Management Information, 1985 Ct. Mgmt. J. 8, 11-12. If reasons exist why a district court cannot pass on a motion for summary judgment within a reasonable preiod of time, then it must

move forward to the next stage of the calendar and schedule the case for trial. See Levitt, A Simple Solution to Judicial Gridlock, 27 Judges' J. 32, 33 (Summer 1988) (Michigan 30-month track from filing to disposition for civil cases); Moran, Stating the Case for Timely Justice, 8 State Ct. K. 23, 25 (Fall 1984) (18-month proposal by Conference of State Court Administrators). Such a system of automatic, self-operating deadlines is reflected in the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, which regulates the pace of criminal proceedings. While the philosophy of the Speedy Trial Act is of course inappropriate in the civil context, the Act reminds all of us that either we keep our own dockets in a timely fashion, or Congress can provide some strong antidotes to justice delayed.

* * *

For the reasons stated, the judgment of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1470 September Term, 1987

In Re: Linda Cramer, Special Administrator of the Estate of Earl Roland Brees,

Petitioner

BEFORE: Robinson, Silberman and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for writ of mandamus be dismissed as moot. On July 20, 1988, the district court granted summary judgment in favor of the defendants and denied plaintiff's several motions for partial summary judgment.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

[Filed August 12, 1989.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARL R. BREES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. Nos. 74-0972
	:	75-0178
ROBERT E. HAMPTON, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

In these consolidated actions plaintiff sues three government agencies. Civil Action No. 74-0972 names the Office of Economic Opportunity ("OEO", presently the Community Services Administration) and the Civil Service Commission ("CSC"). The Department of Commerce is the defendant in Civil Action No. 75-0178.[1] The cases were

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[1]The heads of the agencies in their official capacities are the only proper defendants in Title VII actions, thus the cases against the named defendants in their individual capacities are dismissed.

consolidated because they allege a continuing course of conduct by defendants against the plaintiff involving alleged discriminatory treatment based upon his race and acts of reprisal against him for having lodged administrative complaints against such treatment.

The matter is before the court on twelve separate motions for partial summary judgment by plaintiff; motion of Alvin J. Arnett and Bert A. Gallegos (defendants) to dismiss or, in the alternative, for summary judgment; motion of Frederick B. Dent (defendant) to dismiss or, in the alternative, for summary judgment; plaintiff's opposition to motion of Hampton and Drummond to dismiss or, in the alternative, for summary judgment; and defendants' reply thereto. Plaintiff's many motions for "partial summary judgment" oftentimes seem to crisscross and

overlap and are couched in a sort of drumbeat of repetitive general allegations of conspiratorial conduct on the part of the defendants.[2] Although this tactic

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[2]The motions allege in seriatim:

(a) OEO illegally discriminated against him on the basis of either his sex or race and coerced or took reprisals against him for filing complaints of discrimination by refusing to accept, reject, or process his complaints of discrimination and by appealing the final decision (January 21, 1971) of the Board of Appeals and Review.

(b) OEO took reprisals against him for filing complaints of discrimination by refusing to comply in good faith with the Civil Service Commission's January 21, 1969 Order of Reinstatement and by signing a Letter of Proposed Removal four days before the technical reinstatement became effective.

(c) OEO and the Civil Service Commission Bureau of Personnel Investigations illegally denied plaintiff employment, promotion, and placement on Civil Service Registers by falsely certifying and knowingly submitting to said Bureau an unsigned request for a full field security investigation, by using the results of the illegally initiated investigation as the

(continued)

makes for some confusion, cumulatively these motions reflect plaintiff's basic

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(footnote 2 continued)

basis for plaintiff's attempted discharges and suspension, and by illegally maintaining plaintiff within the "ineligible" status on the Civil Service Register in violation of the 30 day notice requirement of the Veterans Preference Act.

(d) OEO took reprisals against him for filing complaints of discrimination by improperly delegating authority to make the appellate decision.

(e) The Bureau of Personnel Investigations took reprisals against him by delaying the completion of the October 1973 suitability investigation until February 1975, and by refusing until February 1975 to apply in a uniform fashion the Civil Service standards for employment of rehabilitated offenders.

(f) The Civil Service Commission illegally discriminated against him by refusing to accept or process his complaints of discrimination against the Bureau of Personnel Investigations, the Office of Commissioners, and the Office of Executive Director, the Office of General Counsel and the Bureau of Recruiting and Examining.

(continued)

contentions that the defendants separately and/or jointly discriminated against him

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(footnote 2 continued)

(g) The Civil Service Commission took reprisals against him for filing his complaint of discrimination pursuant to this court's Order of Remand, November 18, 1975 by having its General Counsel's Office instruct its Bureau of Personnel Investigations not to answer plaintiff's questions, which were designed to aid his preparation for the administrative hearings to be held pursuant to said Order of Remand.

(h) The resignation of plaintiff from OEO on August 6, 1971 was involuntary and therefore voidable at the option of plaintiff.

(i) The Civil Service Commission, the Office of Executive Director, the Office of General Counsel, the Appeals Examining Office and the Board of Appeals and Review in conjunction with OEO discriminated against him and took reprisals against him by failing to provide fair and mipartial hearings and decisions, by rendering arbitrary and capricious decisions on his appeals, by refusing to uniformly apply the standards for employment of the rehabilitated offender, and by illegally interfering with his preparation of this litigation.

(continued)

on the basis of his race and subjected him to reprisals for complaining against that alleged discrimination by denying him employment and promotion within the civil service, all in violation of Title VII of

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(footnote 2 continued)

(j) The Bureau of Personnel Investigations discriminated and took reprisals against him for filing complaints of discrimination against one of its employees, one W. N. Gillum, by refusing to apply in good faith the January 21, 1969 decision of the Commission that OEO failed to sustain its charges of falsifying an appointment document, by abusing its discretion in applying its rehabilitated offender program standards, and by interfering with the processing of his complaints of discrimination.

(k) The Civil Service Commission denied him a fair and impartial investigation on the issue of discrimination and further that the decision rendered on this issue by the Executive Director, Civil Service Commission, was not supported by the evidence.

(l) The August 6, 1971 agreement between plaintiff and OEO, involving complaints of discrimination, is voidable at the option of plaintiff.

the Civil Rights Act of 1964, 42 U.S.C. § 2000. Plaintiff claims generally that his unfair treatment is reflected by the violation of numerous departmental regulations, and ultimately in the various administrative hearings which he alleges were conducted in an unfair manner.

BACKGROUND

The relationship between plaintiff and the various defendants out of which this controversy arises is set out as follows:

Plaintiff and OEO

Plaintiff was a disabled veteran who was honorably discharged from the military service in 1960.[3] During the following six years while getting a college degree, he worked from time to time in both federal civil service jobs and the private sector. At the end of 1966, plaintiff

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[3]Earl R. Brees is deceased. This suit is being maintained by the adminstrator of Mr. Brees' estate.

sector. At the end of 1966, plaintiff left federal employment and on February 7, 1967, he was employed by a private concern, Travel Consultants Inc. ("TCI") in the District of Columbia. His position was controller, and his duties included the payment of the company's bills, deposit of its income and maintenance of its financial records. In early May 1967, plaintiff signed five checks drawn on TCI's escrow account, totalling over $80,000, all payable to J.R. Bishop, and deposited them into his wife's checking account in an Arlington, Virginia bank. Plaintiff's wife's maiden name was Joy R. Bishop. Officials of TCI became aware of plaintiff's acts shortly thereafter, and on the basis of their complaint, Metropolitan Police officers arrested plaintiff on May 27, 1967 on charges of embezzlement. Subsequently the charge was changed for

forgery, and still later on July 14, 1967, it was further broken down to false pretenses. On September 15, 1967 plaintiff pled guilty to the misdemeanor charge of "attempted false pretenses". Imposition of sentence was suspended, and plaintiff was placed on probation for one year.

Meanwhile, following his May 27, 1967 arrest, on June 8, 1967 plaintiff went back to work for the federal government by reinstatement to a job in the Interior Department's Bureau of Land Management as an operating accountant, GS-9. On or about August 8, 1967, the Accounting Systems Branch, Finance Division of the Office of Economic Opportunity received a co0py of plaintiff's application for federal employment (Form 57). The application was dated May 25, 1967. Question 37 on the form reads: "Have you ever been convicted of an offense against the law or

forfeited collateral or are you now under charges for any offense against the law?" Plaintiff answered this question "No."

As a result of this application, plaintiff was transferred on August 27, 1967, from his Interior Department job to the Acciounting Systems Branch of the Finance Division, OEO, where he was employed as an Accountant, GS-11. On the next day, August 28, 1967, he signed an appointment affidavit containing the following question: "Since you filed application resulting in this appointment, have you been arrested, charged or held by Federal, state or other law enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance?" Plaintiff answered, "No". On the same day the processing required plaintiff to be fingerprinted, and these prints were used to initiate a routine "National Agency Check."

fingerprinted, and these prints were used to initiate a routine "National Agency Check."

From the day he began working at OEO until June 27, 1968, plaintiff performed satisfactorily in his job, and on October 22, 1967, he was promoted to a GS-12 on October 22, 1967. Meanwhile, in early March 1968 the Civil Service Commission notified OEO's Personnel Security Officer that the National Agency Check of plaintiff's fingerprints through the Federal Bureau of Investigation revealed the arrest on May 27, 1967 on the charge of "embezzlement", with no disposition of the charge indicated. Thereupon, OEO requested CSC to conduct a full field investigation in order to ascertain the facts. The resultant report supplied the factual background of plaintiff's involvement with the criminal charges.

In a June 27, 1968 letter OEO notified plaintiff that it proposed to remove him from his position, charging "falsifying an appointment document for Federal employment, to conceal an arrest and charge pending before the District of Columbia Court of General Sessions." After receiving plaintiff's reply, OEO on July 19, 1968 issued a decision dismissing the plaintiff effective August 3, 1968. On August 2, 1968 in separate letters to President Lyndon B. Johnson and the the "Complaints Office" of the CSC, plaintiff complained of racial discrimination and requested to be ealt with as a rehabilitated offender, and on the same day he appealed to the Appeals Examiner's Office of the CSC.

On January 21, 1969, the Appeals Examiner's Office ordered OEO to restore

plaintiff to duty. The Hearing Examiner's opinion which formed the basis of this action noted that:

> In issuing this decision we do not mean to suggest that the appellant's conduct in connection with his application for Federal employment is praiseworthy or that he acted with full candor. Nor are we saying that the agency is pwoerless to seek and effect the appellant's discharge as the facts exhibited in this record. All we hold is that the agency has not supported its charge that Mr. Brees falsified Standard Form 61. [Administrative Record ("A.R.") at 671.]

On February 4, 1969, plaintiff was reinstated but at the same time received a second letter of proposed removal dated January 31, 1969. On March 5th, OEO dismissed his effective March 7, 1969, based on charges of (a) fraud and deception in obtaining Federal employment in concealing an arrest charge, and (b)

criminal conduct in that he entered a plea of guilty to a criminal charge on September 15, 1967. Plaintiff appealed to the agency and pursuant thereto had a hearing before a three-man OEO committee during November and December 1969. The committee was critical of the agency for dismissing plaintiff on essentially the same grounds alleged in its first effort to fire him and recommended plaintiff's reinstatement. Nevertheless, on March 31, 1970, a final agency decision sustained plaintiff's discharge based on the charge of criminal conduct. In his appeal to CSC's Appeals and Examining Office, plaintiff contended that OEO had refused to process his complaint that racial discrimination was a factor in his discharge and that the agency had issued its decision without resolving the racial discrimination issue. Plaintiff's claim of racial discrimination

was based on his allegation that the agency hired blacks who had more serious criminal records that his, and that if he were not white he would not have been fired. Shortly thereafter the Appeals and Examining Office rescinded OEO's decision and remanded the discharge case to OEO for the purpose of processing plaintiff's discrimination complaint. The Commission's Board of Appeals and Review rejected OEO's appeal from this decision on January 21, 1971, and on February 11, 1971 the agency began processing the discrimination complaint. This process apparently involves the selection of an agency counselor by the employee who would make an informal investigation of his complaint with a view toward resolving it at the agency level. Between February 11, 1971 and June 30, 1971, plaintiff's claims remained unresolved and on June 30, OEO

requested the CSC to furnish an investigator for plaintiff's EEO complaint against the agency.

Meanwhile, a meeting was held on July 22, 1971 between plaintiff and OEO's Director of Personnel, its Assistant General Counsel, and a newly-appointed Associate Director of Administration. At this time plaintiff requested reinstatement. Ernest Russell, the new Associate Director, indicated that he had made a thorough review of the file and was of the opinion that the agency had a good case to support plaintiff's discharge but in the bset interests of all concerned the Commission ought to review the file and make a decision. He further stated that OEO would continue to process the discrimination complaint. Plaintiff claims that because he feld mistreated by OEO and was financially pressed, he was looking for a

job. Plaintiff did not wish a discharge reflected on his record and proposed that if OEO reinstated him he would resign at a specified date. Plaintiff also suggested at the time certain retirement and leave without pay benefits.

Pursuant to the discissuion at the meeting a draft settlement agreement and appropriate personnoel documents were drawn by Edward Senseny, Chief of Personnel Operations. These were based primarily on notes taken at the meeting by the Director of Personnel. Between July 23 and July 29, 1971, Senseny had contact with the plaintiff relative to the proposed agreement. After review by the Office of Administration and the General Counsel of OEO, the draft was delivered to plaintiff on or before July 29, 1971. On August 6, 1971 the parties signed a final draft which provided tht the March 7, 1969

removal was to be cancelled; plaintiff was to be reinstated to the position of Systems Accountant, GS-510-12 as of August 6, 1971; he was to get all back pay due from March 7, 1969, and all pay adjustments; he was to be credited with all annual leave he would have earned and the agency would allow him to take annual leave from August 9, 1971 until October 19, 1971; he would take leave without pay from the latter date until September 6, 1972, at which time he would resign from his position unless he decided to resign earlier; the design to resign, which was to be irrevocable, constituted a material inducement to the agency to reinstate plaintiff; plaintiff acknowledged that he made the original offer to resign and that neither the offer nor the agreement was obtained by duress or coercion of the agency or any of its employees; plaintiff agreed to

withdraw his appeals under parts 713 and 752-B of the Civil Service regulations and not to file subsequent complaints arising from the same subject matter; plaintiff agreed that the agreement was in resolution of the adverse action and was not to be construed as a finding in favor of plaintiff's claim of discrimination; and, plaintiff would not disclose the terms of the agreement without the agreement of the agency.[4]

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[4]The entire document reads:

AGREEMENT CONCERNING THE
REINSTATEMENT OF MR. EARL BREES
TO THE POSITION OF SYSTEM ACCOUNTANT
GS-510-12

This agreement is entered into August 6, 1971, between the Office of Economic Opportunity, represented by the Acting Associate Director of Administration, Mr. Ernest Russell and Mr. Earl Brees.

(continued)

After the signing of the agreement, plaintiff was paid for the period stated

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(footnote 4 continued)

1. By this agreement the Office of Economic Opportunity agrees to reinstate Mr. Earl Brees to the position of System Accountant, GS-510-12, Step 5, on August 9, 1971.

2. The Office of Economic Opportunity further agrees to restore to Mr. Brees all back pay to which he is legally entitled from the time of removal, Marqch 7, 1969, until the date of reinstatement of August 9, 1971, including all pay adjustments for regular periodic step increases. Effective October 17, 1971, Mr. Brees' pay status will be changed from step 5 to step 6 of GS-12.

3. To the extent creditable pursuant to applicable laws and regulations, all annual leave which Mr. Brees would have earned during the period of removal will also be restored to him. Mr. Brees hereby requests and the Office of Economic Opportunity hereby grants annual leave to Mr. Brees effective August 9, 1971, and continuing until close of business October 19, 1971. Upon the use of all of his accrued annual leave, Mr. Brees hereby agrees to assume a leave without pay status which shall continue until September 6, 1972, unless terminated earlier pursuant to paragraph 4, below.

(continued)

therein and bagan the use of annual leave.

On October 28, 1971, he attempted to

(footnote 4 continued)

4. Mr. Brees hereby resigns from his position in the Office of Economic Opportunity effective Septe,ber 6, 1972, unless Mr. Brees decides on his own volition to resign on a date prior to September 6, 1972. Mr. Brees hereby agrees that his decision to resign as set forth hererin constitutes an irrevocable decision which shall not be withdrawn by him nor shall the irrevocable nature of his resignation be affec ed in any way by subsequent changes in applicable fedearl law or regulations. Mr. Brees acknowledges and understands that his resignation constitutes a material inducement to the Office of Economic Opportunity to reinstate him. Mr. Brees further acknowledges that he made the initial offer to resign and that his offer and the provisions for resignation contained herein were not secured or obtained by duress or coercion by the Office of Economic Opportunity or any of its employees.

5. At the time of the signing of this agreement, Mr. Brees will post a letter signed by him to the United States Civil Service Commission with a copy to the Office of Economic Opportunity which irrevocably withdraws his complaint of discrimination against the Office of

(continued)

return to duty with the agency but was refused and on October 29, 1971, he

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(footnote 4 continued)

Economic Opportunity filed under Part 713 of the FPM and his appeal of his removal filed under Prat 752 of the FMP. Mr. Brees understands and acknowledges that withdrawal of such complaint and appeal is in consideratoin of the terms of this agreement and includes an agreement not to file subsequent complaints and appeals resulting from or arising out of the same subject matter as contained in his complaint and appeal or from any decisions heretofore made by the Office of Economic Opportunity concerning Mr. Brees.

6. Mr. Brees affirms that this agreement is in resolution of the adverse actoin taken by the Office of Economic Opportunity against Mr. Brees under Federal Personnel Manual Chapter 752 and shall in no way be construed to mean that OEO or any other agency has found or may find in favor of Mr. Brees' complaint of discrimination.

7. Mr. Brees agrees that he shall not publicly release or disclose this agreement or any part thereof without the written consent of the undersigned representative of the Office of Economic Opportunity.

A.R. at 2816 - 18.

attemtped to withdraw his resignation. This request was denied by the agency. Accordingly, plaintiff remained in a leave without pay status from November 15, 1971 until September 6, 1972, at which time his separation by resignation was effected.

Following the date of his separation, plaintiff submitted an appeal to the Civil Service Commission in which he alleged that his resignation was involuntary and that the agency should have allowed him to withdraw it. The final determination of the Commission, issued on May 4, 1973, was that the resignation was voluntary and that the agency had valid reasons for not granting the request for its withdrawal. This court remanded the case to the CSC for the purpose of conducting a hearing on the issue of voluntariness of the resignation. The issue was resolved adversely to plaintiff at the agency level.

Plaintiff and CSC (BPI)

From time to time the CSC issues announcements that it wishes to fill certain specified positions. Persons who wish to be considered for these positions submit standard applications which indicate that they wish to be placed on the egister for consideration._ CSC area examining offices review these applications and rate then on the basis of knowledge and qualifications which indicate the ability to perform the job sought. These examining offices do not determine whether an applicant is otherwise suitable for Federal employmentg. When a question of suitability arises, the examining office refers the applications to the Commission's Bureau of Personnel Invesigation ("BPI") for an assessment. A referral for this purpose is called a "request of suitability for Federal employment."

Routinely area examining offices refer applications to BPI for such determination if the application indicates prior criminal conduct or previous rating of unsuitabililty.

Between May 1968 and February 1969, the Washington area examining office referred several applications for employment made by the plaintiff in response to certain announcements of available positions. Included among these applications was that of May 25, 1967. On March 5, 1969 BPI directed a show-cause letter to plaintiff which advised that he had 15 days within which to reply to certain derogatory data which had surfaced in the course of the investigation of his suitability. In addition to setting out plaintiff's involvement in the criminal proceedings, the letter pointed out that although his separation from employment

with TCI was concurrent with the discovery of the attempted embezzlement; on all but the one of May 25, 1967, plaintiff had listed as his reason for leaving that employment was "excessive hours of work."

Following the receipt of plaintiff's reply, BPI determined that because of "dishonest conduct," his applications which had been referred to it wouold be rated ineligible for the positions sought. The unsuitability ratings were for the specified registers only and had no relationship to Brees' current employment at the time with OEO. The unsuitability ratings were appealed through the appellate levels of the CSC where they were affirmed.

In late 1973, plaintiff submitted several applications for employment pursuant to three separate announcements of positions which were then open. Plain-

latest applications to BPI, plaintiff filed a succession of EEO complaints against BPI and the CSC in December 1973 and January 1974, alleging racial discrimination and reprisals against him in the processing of all his applications and in his nonselection for employment. On January 28, 1974, plaintiff filed a discrimination complaint against BPI and others in the CSC for failure to process his earlier complaints, for conspiring with OEO, for refusal to place him on CSC registers, for referral for a new investigation, for dissemination of false and derogatory information about him, for conspiracy with security people, HEW and the Department of Commerce to keep him from being hired and for miscellaneous reprisals by the Commission.

During the course of the pretrial proceedings in this case these broad

allegations against BPI were remanded to the Commission for the purpose of processing plaintiff's EEO allegations. An investigation was conducted from January 15 through 28, 1976. Informal resolution was not accomplished and plaintiff requested a hearing on all of his allegations. The requested hearing was held and at the conclusion thereof the hearing examiner submitted to the Commission extensive findings of fact. Based upon these facts, the hearing examiner recommended that the Commission determine that plaintiff had not been victimized by either discrimination of reprisal. The Commission adopted the findings and recommendation of the examiner and issued a decision that there had been neither discrimination or reprisal against plaintiff.

allegations against BPI were remanded to the Commission for the purpose of processing plaintiff's EEO allegations. An investigation was conducted from January 15 through 28, 1976. Informal resolution was not accomplished and plaintiff requested a hearing on all of his allegations. The requested hearing was held and at the conclusion thereof the hearing examiner submitted to the Commission extensive findings of fact. Based upon these facts, the hearing examiner recommended that the Commission determine that plaintiff had not been victimized by either discrimination of reprisal. The Commission adopted the findings and recommendation of the examiner and issued a decision that there had been neither discrimination or reprisal against plaintiff.

Plaintiff and Commerce

Plaintiff applied for a temporary appointment as a computer specialist in the Office of Telecommunications of the Department of Commerce. Pending a protracted pre-appointment check of plaintiff, a decision was made to abolish the position. Plaintiff alleges that the Department of Commerce on its own and in concert with BPI unlawfully denied him employment in the agency and by doing so they discriminated against him and subjected him to reprisal. A hearing as had on these charges and the issues were resolved against plaintiff at the agency level.

DISCUSSION

The various proceedings before the agencies have generated an extensive administrative record of over 7,000 pages, including over 6,000 pages of hearing

transcripts. Plaintiff contends that this record reflects that (1) the adverse decisions against him are not supported by credible substantial evidence; (2) he was victimized by procedural errors and violations which violated his rights under varoius acts, regulations, and the Constitution; and (3) the hearings were ot fair and impartial and the decisions were arbitrary and capricious. Thus he seeks an order setting aside the adverse determinations and certain injunctive relief making him whole for his alleged injuries.

Defendants claim that the record evidence more than supports the various decisions, that there were no procedural errors which prejudiced the plaintiff, and that the record affirmatively demonstrates that plaintiff received fair hearings. They urge that the agency actions be upheld.

Plaintiff's contentions obviously impose a dual task upon the court. Insofar as the claim that the agency decisions are not supported by substantial record evidence is concerned, the court understands its function, i.e., to examine the record for the presence of substantial evidence that supports the agency determinations. At the same time it appears that the court is faced with the task of making a de novo determination as to whether or not the proceedings which resulted in adverse determinations for plaintiff were in fact conducted in a fashion which respected his right to due process and ultimate fairness.

With this approach in mind, the court has considered the entire administrative record in the light of the submissions of the parties, and it appears that the record supports the contentions of the

defendants rather than those of the plaintiff.

The adverse decisions of the administrative agencies are clearly predicated upon substantial direct and circumstantial evidence in the record. The evidence supporting plaintiff's claims consists mainly of his uncorroborated testimony which was, for the most part, strongly contradicted by the testimony of other witnesses and some of the documentary evidence.

As to the complaint of alleged procedural errors cited by plaintiff, the court finds that they are either nonexistent or inconsequential to the overall fairness of the various proceedings. Although all of plaintiff's claims in this regard have been considered and are rejected, only one merits discussion.

Plaintiff asserts that he was deprived of witnesses critical to his case. Rather than bearing him out, the record affirmatively indicates that this did not occur. For example, in preparation for the hearing on the issue of discrimination and reprisal by the CSC which was held in mid-1977, the examiner sought from counsel for both sides statements of proposed issues, and lists of witnesses with offers of proof for each witness. Plaintiff never responded satisfactorily to this request, but continued to request witnesses, even during the hearing, and made no specific proffer as to their testimony. The examiners disallowed witnesses for whom no proffer or admissible relevant testimony was made; and some were disallowed because the proffers as to them revealed that their testimony would be cumulative.

As to plaintiff's claim that the hearings were unfairly conducted, the record thoroughly contradicts him. The hearings were protracted and sometimes tedious. One of the hearings was conducted on eight days over a period of three months and another one was a 13-day proceeding over a period of three months. The hearing on the matter involving the Department of Commerce was a three-day proceeding. Naturally during the course of the hearings the examiners were called upon to make on-the-spot determinations, and upon being subjected to the unerring gaze of hindsight some of these rulings may not appear to have been 100% correct; but to the extent that they were not so perfect, none of them -- singularly or cumulatively -- rose to the level of tainting the fundamental fairness of the proceedings.

And finally, the record definitely reflects, rather than bias and prejudice in the conduct of the hearings, a tendency to indulge plaintiff, and uncommon patience on the part of the examiners.

CONCLUSION

Upon consideration of the foregoing, it is ordered that summary judgment be granted in favor of the defendants.

The plaintiff's motions are denied.

WILLIAM B. BRYANT
SENIOR UNITED STATES
DISTRICT JUDGE

Date: July 20, 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5086 September Term, 1986

C.A. No. 74-00972

In Re: Earl Roland Brees,

Petitioner

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, it is

ORDERED by the court that the petition be denied without prejudice. See Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974). We are confident that the district court will act with all due haste in regard to Case Nos. 74-792 and 75-178.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

[Filed May, 1, 1987.]